IP 04-1223-C H/K Firestone v Standard Mgmt. [2]
Judge David F. Hamilton Signed on 07/13/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MURRAY I. FIRESTONE,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:04-cv-01223-DFH-TAB
	)	
STANDARD MANAGEMENT CORPORATION,	)	
US HEALTH SERVICES CORPORATION,	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MURRAY FIRESTONE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	CASE NO. 1:04-cv-1223-DFH-TAB
STANDARD MANAGEMENT	)	
CORPORATION and U.S. HEALTH	)	
SERVICES CORPORATION,	)	
	)	
Defendants.	)	

SUPPLEMENTAL ENTRY ON MOTION FOR JUDGMENT ON PLEADINGS

In the court's July 5, 2005 entry on defendants' motion for judgment on the pleadings, the court ordered plaintiff Firestone to show cause why the court should not enter judgment for defendants on Firestone's wage claim count. Count III of Firestone's complaint alleges that the defendants violated Indiana's Wage Claim Statute, Indiana Code § 22-2-9-1 *et seq.*, when they failed to make timely severance and bonus payments as provided in the offer letter. Firestone was required to pursue administrative remedies with the Indiana Department of Labor ("DOL") on his wage claim. There was no specific indication in the complaint that he did so. Firestone has responded to the court's order with evidence that he brought his wage claim to the DOL before filing a claim with this court. Accordingly, the court considers the merits of Firestone's claim under Indiana's Wage Claim Statute. For the reasons explained below, defendants' motion for

judgment on plaintiff's wage claim is denied with respect to the first-year guaranteed bonus payment and granted with respect to the severance payment.

Indiana Code § 22-2-9-2 requires an employer to pay a discharged employee any unpaid wages or compensation to which the employee is entitled. See *Pyle v. National Wine & Spirits Corp.*, 637 N.E.2d 1298, 1299 (Ind. App. 1994). The related Wage Payment Statute requires an employer to pay each employee at least semimonthly or biweekly, if requested, the amount due the employee. Ind. Code § 22-2-5-1(a). The Wage Payment Statute also requires payment to be made for all wages earned to a date not more than ten days prior to the date of payment. Ind. Code § 22-2-5-1(b).

Under the Wage Claim Statute and in many cases under the Wage Payment Statute, wages are defined as "all amounts at which the labor or service rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or in any other method of calculating such amount." Ind. Code § 22-2-9-1(b); see *Manzon v. Stant Corp.*, 138 F. Supp. 2d 1110, 1113, n.3 (S.D. Ind. 2001) (discussing application of definition in § 22-2-9-1 to Wage Payment Statute); but see *Jeurissen v. Amisub, Inc.*, 554 N.E.2d 12, 13 (Ind. App. 1990) (applying alternative definition of wages used in *Wilson v. Montgomery Ward & Co., Inc.*, 610 F. Supp. 1035, 1038 (N.D. Ind. 1985): "something akin to the wages paid on a regular, periodic basis for regular work done by the employee

– the paycheck which compensates for the work done in the previous two weeks").

Defendants argue that, contract issues aside, the bonus and severance payments specified in the offer letter are not "wages" as defined in § 22-2-9-1(b). The offer letter specified an annual bonus:

> You will be entitled to an annual bonus equal to 1½% of earnings before interest and taxes ("EBIT") of USHS. For the year ending December 31, 2003, you will be guaranteed a minimum bonus of $100,000.

Complaint, Ex. 1. This bonus provision refers to two types of payments: an annual payment linked to company earnings, and a guaranteed lump sum payment of $100,000 for the first year of employment. Under Indiana law, the difference is critical. A bonus is a wage "if it is compensation for time worked and is not linked to a contingency such as the financial success of the company." *Highhouse v. Midwest Orthopedic Institute, P.C.*, 807 N.E.2d 737, 740 (Ind. 2004), quoting *Pyle v. National Wine & Spirits Corp.*, 637 N.E.2d 1298, 1300 (Ind. App. 1994).

In *Highhouse*, the Indiana Supreme Court concluded that the bonus the plaintiff claimed he was due was not a "wage" for the purposes of the Wage Payment Statute. The *Highhouse* court found that payment of the bonus depended on the plaintiff's productivity and also on the defendant's expenses, which were not within plaintiff's control. 807 N.E.2d at 740. Thus, the court

reasoned, where the calculation of a bonus the calculation depends on expenses of the company's overall operations, it cannot be treated as a wage, just as a bonus based on the financial success of the company is not a wage. *Id.*

Similarly, in *Whitsell v. Bradshaw Insurance Group, Inc.*, 321 F. Supp. 2d 983, 988 (N.D. Ind. 2004), the district court concluded on summary judgment that a profit sharing bonus was not a wage under the Indiana Wage Payment Statute because the evidence demonstrated that the plaintiff would not have received a bonus had the employer not made a profit. The district court compared the case to *Highhouse*:

> Under *Highhouse*, whether a bonus was a wage hinged primarily upon whether the bonus was linked to the financial operation of the company and secondarily upon whether the bonus was or could reasonably have been payable at regular 10-day intervals. In this case, there can be no dispute that the profit sharing bonus was directly linked to [the defendant company's] financial success.

Whitsell, 321 F. Supp. 2d at 987; see also *Herremans v. Carrera Designs, Inc.*, 157 F.3d 1118, 1121 (7th Cir. 1998) (affirming district court finding that unpaid bonus was not wage because bonus was based on a share of annual profits of company and could not have been calculated or paid on the semi-monthly or biweekly schedule contemplated by Ind. Code § 22-2-5-1(a)); *Manzon v. Stant Corp.*, 138 F. Supp. 2d 1110, 1113-14 (S.D. Ind. 2001) (concluding that annual incentive compensation plan was not wage because plan was based in part on the success of the company during the year and because it could not be paid bi-

weekly); *Gress v. Fabcon, Inc.*, 826 N.E.2d 1, 4 (Ind. App. 2005) (finding sales commissions not a wage because the salesperson earned no commission if the project did not result in a profit for the employer, and because it was impossible for the employer to know what plaintiff was owed within ten days); *Jeurissen v. Amisub, Inc.*, 554 N.E.2d 12, 13 (Ind. App. 1990) (finding incentive payments linked to performance of employer hospital were not wages under Wage Payment Statute, using *Wilson v. Montgomery* definition of wages); *Die & Mold, Inc. v. Western*, 448 N.E.2d 44 (Ind. App. 1983) (finding vacation pay wages as defined by § 22-2-9-1(b) because it is "in the nature of deferred compensation in lieu of wages earned each week the employee works, and is payable at some later time").

The pleadings do not show that defendants are entitled to judgment as to whether the alleged guaranteed first-year bonus of $100,000 qualifies as a wage under the Wage Claim Statute. The defendants' use of the term "bonus" does not control the court's inquiry; whether the guaranteed "bonus" is a wage under Indiana law depends only on the substance of the compensation. *Wank v. St. Francis College*, 740 N.E.2d 908, 912 (Ind. App. 2000). The face of the offer letter indicates that the guaranteed bonus exhibits most of the qualities associated with wages under Indiana case law. First, there is no evidence that the guaranteed bonus of $100,000 for Firestone's first year of work was linked to a contingency such as the company's profits or the profitability of Firestone's individual efforts. The offer letter does not provide a reason for the "guaranteed" bonus other than for work performed during the first year of employment. Second, because the

guaranteed amount was specified in advance, it may have been payable, if requested, on a biweekly basis. Nothing in the offer letter indicates that Firestone was required to work the entire first year before he could collect on the guaranteed bonus.[1]

Accordingly, defendants' motion for judgment on the pleadings with respect to the guaranteed first-year bonus of $100,000 specified in the offer letter is denied. In contrast to the guaranteed first-year bonus, the later annual bonuses equal to 1½% of company earnings do not constitute wages under the statute because they are clearly linked to company profitability. Firestone has no statutory claim for that portion of the bonus. See *Highhouse*, 807 N.E.2d at 740.

Defendants also argue that the severance payment specified in the offer letter is not a wage under Indiana law. The offer letter stated:

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[1]In their opening brief, defendants attempted to preempt Firestone's citation to *Gurnik v. Lee*, 587 N.E.2d 706 (Ind. App. 1992). See Def. Br. 11 at 10 n.4. The employment agreement in *Gurnik* provided for a minimum annual bonus of $5,300. The bonus was not conditioned on whether the employer company was profitable. *Id.* at 707. The Indiana Court of Appeals concluded that the guaranteed bonus was a wage as defined in Indiana Code § 22-2-9-1(b). In their brief, defendants argued two differences between *Gurnik* and this case: (1) the guaranteed minimum bonus in *Gurnik* was paid regularly every year, and (2) the employment agreement provided for a *pro rata* payment, making the bonus more akin to biweekly compensation and more closely linked to the amount of actual work. These factors, although considered by the *Gurnik* court in its decision, are not controlling. The minimum bonus in *Gurnik*, like the guaranteed first-year bonus alleged here, was not predicated on the financial success of the company and the amount to be distributed was known in advance. Furthermore, neither *Gurnik* nor any other case found by this court requires that a *pro rata* distribution be specified or that a bonus be given every year to be considered a wage under Indiana's Wage Claim Statute, if the bonus amount is specified in advance.

> Your position will be Chief Executive Officer for USHS. Your base salary will be $275,000 per year. You will receive a three (3) year employment contract which will include a one (1) year severance payment equal to your base salary.

Complaint, Ex. 1. The court concludes that the Indiana Supreme Court, if it decided the issue today, would not find the severance payment in this case to be a wage under Indiana's Wage Claim Statute.

A severance payment does not constitute a wage under Indiana's wage statutes if the payment is not tied to regular work performed by the plaintiff and the severance is not deferred compensation in the same manner as vacation pay. *Design Industries, Inc. v. Cassano*, 776 N.E.2d 398, 403-04 (Ind. App. 2002), citing *Wank v. St. Francis College*, 740 N.E.2d 908 (Ind. App. 2000). *Cassano* is analogous to the case here.[2] The plaintiff in *Cassano* had negotiated prior to his employment a severance package including a continuation of biweekly salary payments for nine months after termination of employment. Reversing the trial court's denial of summary judgment to the employer on the wage issue, the Indiana Court of Appeals held that the severance payment did not constitute

[2]The *Wank* court had concluded that the plaintiff's severance package was not a wage for the purposes of the Wage Payment Statute because the package was connected to plaintiff's years of service and was not compensation that had accrued during plaintiff's employment. Rather, the court found that the severance package, which was limited to those employees terminated because of a merger, was a bonus offered to the plaintiff "to recognize and honor his commitment" to the employer, and was "a discretionary, gratuitous benefit offered to employees as an act of benevolence." 740 N.E.2d at 913-14. The evidence here indicates that the severance payment specified in the offer letter is not a discretionary, gratuitous benefit.

wages because there was no indication that it was compensation for work performed. 776 N.E.2d at 404. Chief Judge Brook concurred in the result. He reasoned that continuation of salary after the effective date of termination could not be payment for labor or service rendered. *Id.*

In considering questions of state law that arise in diversity cases, the court must decide the questions as it predicts the Indiana Supreme Court would decide them if the case were before it today. *Woidtke v. St. Clair County, Illinois*, 335 F.3d 558, 561-62 (7th Cir. 2003); *Research Sys. Corp. v. IPSOS Publicite*, 276 F.3d 914, 925 (7th Cir. 2002). If the state's highest court has not ruled on an issue, intermediate appellate decisions ordinarily provide a strong indication of how the highest court would rule unless there is a persuasive reason to believe otherwise. *IPSOS Publicite*, 276 F.3d at 925; *General Accident Ins. Co. of America v. Gonzales*, 86 F.3d 673, 675 (7th Cir. 1996). The holding and reasoning in *Cassano*, when viewed in light of *Highhouse*, indicate that the Indiana Supreme Court would rule that the severance payment here is not a wage. The reasoning in *Cassano* is consistent with the *Highhouse* line of cases dealing with bonuses. Even where a guaranteed bonus and a severance payment are both agreed upon prior to the start of employment, the severance payment, unlike the guaranteed bonus, cannot be made on a biweekly basis during the period of employment.

There is no set of facts consistent with the pleadings that could support a finding that the severance payment here constitutes wages under Indiana law.

Accordingly, defendants' motion for judgment on the pleadings with respect to the severance payment is granted.[3]

Conclusion

For the foregoing reasons, defendants' motion for judgment on plaintiff's wage claim is denied with respect to the first-year guaranteed bonus payment and granted with respect to the severance payment. The court grants Firestone leave to amend his complaint under Rule 15(a) to state a claim for the severance payment as a contract claim rather than a wage claim.

So ordered.

Date: July 13, 2005

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

Copies to:

Peyton Louis Berg
BOSE MCKINNEY & EVANS, LLP

[3]The plaintiff requests leave to amend his complaint to state a claim for the severance payment as a contract claim rather than a wage claim, in the event the court grants judgment for defendants on that issue. If the offer letter is found to be a valid and enforceable contract at a later stage of litigation, the severance term also could be enforceable. The court grants plaintiff's request to add a claim for the severance payment under Count IV of his complaint. It is the general rule that amendments to pleadings are favored and should be liberally allowed in furtherance of justice in order that every case may, so far as is possible, be determined on the merits. The defendants will not be substantially prejudiced by the granting of plaintiff's request to amend because they have had notice of the issue, and the disposition of the case will not be delayed.

pberg@boselaw.com

Matthew S. Effland
OGLETREE, DEAKINS, NASH, SMOAK & STEWART
matthew.effland@odnss.com

Daniel C. Emerson
BOSE MCKINNEY & EVANS, LLP
demerson@boselaw.com

Andrew M. McNeil
BOSE MCKINNEY & EVANS, LLP
amcneil@boselaw.com

Kenneth B. Siepman
OGLETREE, DEAKINS, NASH, SMOAK & STEWART
kenneth.siepman@odnss.com